SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 29 1966
JOHN F. DAVIS, CLERK

No. 1065

Supreme Court of the United States

OCTOBER TERM, 1965

EDWARD H. SMALLEY, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

STANLEY L. TEMKO
701 Union Trust Building
Washington, D. C. 20005

CHARLES J. BLOCH
710 Walnut Street Building
Macon, Georgia

JOHN W. MADDOX
P. O. Box 29
Rome, Georgia

Attorneys for Respondent

COVINGTON & BURLING
Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Reasons for Denying the Writ	7
Conclusion	14

CITATIONS

Cases:

Bailey v. *Central Vermont Ry.*, 319 U.S. 350 (1943)	10
Baum v. *Baltimore & O. R.R.*, 256 F.2d 753 (7th Cir.), *cert. denied*, 358 U.S. 881 (1958)	11
Brown v. *Western Ry. of Alabama*, 338 U.S. 294 (1949)	13, 14
Cincinnati Street Ry. v. *Snell*, 179 U.S. 395 (1900)	8
Department of Banking v. *Pink*, 317 U.S. 264 (1942)	8, 9
Douglas v. *New York, N.H. & H. R.R.*, 279 U.S. 337 (1929)	13
Gospel Army v. *Los Angeles*, 331 U.S. 543 (1947)	8
Halderman v. *Pennsylvania R.R.*, 53 F.2d 365 (2d Cir. 1931)	11
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	13
Johnson v. *Keith*, 117 U.S. 199 (1886)	8
Local 438, Construction & General Laborers' Union v. *Curry*, 371 U.S. 542 (1963)	9
Louisville & N. R.R. v. *Pettis*, 206 Ala. 96, 89 So. 201 (1921)	12
Market Street Ry. v. *Railroad Comm'n*, 324 U.S. 548 (1945)	9
Metropolitan Coal Co. v. *Johnson*, 265 F.2d 173 (1st Cir. 1959)	11
Minneapolis & St. L. R.R. v. *Bombolis*, 241 U.S. 211 (1916)	13
Pennsylvania Co. v. *Donat*, 239 U.S. 50 (1915)	12
Powers v. *New York Cent. R.R.*, 251 F.2d 813 (2d Cir. 1958)	11
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945)	9
Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62 (1948)	9
Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69 (1946)	9
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957)	10
Sassaman v. *Pennsylvania R.R.*, 144 F.2d 950 (3d Cir. 1944)	11
Southern Pac. Co. v. *Gileo*, 351 U.S. 493 (1956)	8
Southern Ry. v. *Lloyd*, 239 U.S. 496 (1916)	12
Sullivan v. *Matt*, 130 Cal. App. 2d 134, 278 P.2d 499 (Dist.Ct. App. 1955)	12

Page

Tennant v. *Peoria & P.U. Ry.*, 321 U.S. 29 (1944) 10
Texas & Pac. Ry. v. *Jones*, 298 F.2d 188 (5th Cir. 1962) 11
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 10
Tracy v. *Holcombe*, 65 U.S. (24 How.) 426 (1860) 8
Urie v. *Thompson*, 337 U.S. 163 (1949) 8
Worthen v. *Thompson*, 343 Ill. App. 62, 98 N.E.2d 142 (Ill. App.Ct. 1951) 11

Statutes:

28 U.S.C. § 1257 .....1, 2, 7, 8
Boiler Inspection Act, 45 U.S.C. § 22 *et seq.* 3
Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.* ..2, 3, 6, 9, 10, 11, 12, 13, 14
Ga. Code Ann. § 38-107 .....6, 13

Miscellaneous:

Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384 (1956) 13
Stern & Gressman, Supreme Court Practice (3rd ed. 1962) .. 8

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1065

EDWARD H. SMALLEY, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 112 Ga. App. 471 (R. 679). The order of the Supreme Court of Georgia denying certiorari is unreported (R. 721).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent con-

tends, as discussed at pp. 7-9, *infra*, that this Court lacks jurisdiction to review the judgment of the Court of Appeals of Georgia because that judgment is not final within the meaning of 28 U.S.C. § 1257.

QUESTION PRESENTED

Aside from the question of this Court's lack of jurisdiction, the question is whether, in a suit by a railroad engineer against his employer under the Federal Employers Liability Act to recover for injuries he sustained while asleep in a caboose several hours after he had completed his work for the day, the Court of Appeals of Georgia erred in reversing a judgment for the engineer and ordering a new trial on the ground that, "under the conflicting evidence in this case," the question whether the engineer was "engaged in activities incident to or an integral part of his employment at the time of the injury" should have been submitted to the jury.

STATEMENT

Petitioner, a railroad employee, brought this action against respondent in the Superior Court of Cobb County, Georgia, to recover for injuries he sustained in a fire on a caboose owned by respondent. The petition, as amended, alleged that petitioner's injuries were the result of several instances of negligence attributable to respondent. The petition did not expressly state that petitioner was relying upon the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.*, although it did allege, in accordance with the requirements of the FELA, that respondent was a common carrier by railroad in interstate commerce and that petitioner

was employed in interstate commerce or in furtherance thereof (R. 35).[1]

Respondent, among other defenses, denied that petitioner was engaged in activities related to his employment when he was injured:

> "(c) Plaintiff, at the time he allegedly was injured, was not on duty with or for the defendant, was not engaged in any act, duty, service or work of or for the defendant or which was a necessary incident of his work for defendant or imposed upon him by his employment, was not acting within the course or scope of his employment, and was not in an employer-employee status or relationship." (Ans. par. 21, R. 59.)

Respondent thus contended that petitioner's claim did not fall within the FELA and, accordingly, asserted as a bar to recovery the two-year Georgia statute of limitations and the doctrine of contributory negligence as construed by the courts of South Carolina, where the accident took place (Ans. par. 22, R. 60). The trial court ordered these defenses, either of which would be a complete bar to recovery if petitioner's claim did not come within the FELA, stricken following petitioner's special demurrer (R. 72).

The evidence at trial, briefly summarized below, revealed a clear conflict as to whether petitioner had been engaged in activities related to his employment at the time of the fire which resulted in his injuries.

---

[1] The petition as originally filed set forth a second count based upon respondent's alleged violation of the Federal Boiler Inspection Act, 45 U.S.C. § 22 *et seq.* (R. 37-38). This count was dismissed following respondent's general demurrer (R. 56). Petitioner did not appeal from this dismissal.

Petitioner completed his run from Greenville, South Carolina, to Westminster, South Carolina, shortly after 1:00 P.M. (R. 247). He signed off duty at 1:15 P.M. (R. 279-80), and was not required to report for work again until 7:00 A.M. the following morning —some 17 hours later—when he was scheduled to make another run (R. 283). Nor was any member of his crew required to be available for work before 7:00 A.M. (R. 282-83, 356), and apparently all but two—petitioner and the conductor—left Westminster to spend the night at their homes (R. 281-82, 339, 357).

After signing off duty, petitioner went into the town of Westminster to get something to eat (R. 218, 284). In mid-afternoon—some time between 2:00 and 4:00 P.M.—he returned to the railroad yards to a caboose maintained by respondent for the convenience and comfort of members of the train crew (R. 285, 342). From shortly after his return until late in the afternoon, petitioner played poker with three others, the conductor and the brakeman, and an outsider (R. 223, 289).

The poker game lasted for approximately two hours (R. 295, 342). The conductor, Owens, testified that he left petitioner in the caboose at about 7:00 P.M. (R. 423, 518-19). Petitioner told Owens that he wanted to take a nap in the caboose and would come into town later in the evening to watch television and spend the night (R. 301-03). Petitioner testified that he fell asleep and awoke some time later to discover that he was on fire (R. 224-25, 311). Owens testified that he returned to the caboose around 8:00 P.M. and discovered petitioner had been rescued from the fire (R. 423, 520-21). There was evidence that petitioner had

been drinking before he fell asleep (R. 552-53, 573, 590, 601, 649-50).

Petitioner sustained serious injuries as a result of the fire, for which he sought recovery in this action. There was testimony at trial that it was not customary for any members of the train crew to spend the night in the caboose (R. 397, 402); that those who remained in Westminster stayed at the boarding house where petitioner had said he planned to spend the night (R. 357). An agent of respondent had made arrangements for members of the train crews at the boarding house (R. 358, 400, 462).

A witness for respondent testified that the caboose was maintained for trainmen (conductors, flagmen, brakemen) and that enginemen (engineers and firemen) were forbidden by railroad practice and rule from using it (R. 464, 471). The brakeman, however, testified that it was customary for engineers to use the caboose (R. 377), and Owens testified that no one had ever objected to their doing so (R. 421). Other witnesses testified that engineers had used the caboose on occasion (R. 397, 491-92), but no witness testified that they ever spent the night in it.

There was no dispute that the members of petitioner's crew were off duty until 7:00 A. M. on the morning following the fire. Employees of respondent testified that the members of the crew were free to do whatever they wanted in the meantime (R. 359, 399, 465, 485). But petitioner testified that he was subject to call on an emergency basis, and that it was for respondent's convenience and benefit that he remained overnight in Westminster (R. 218).

At the close of the evidence, respondent sought again to put in issue whether petitioner was engaged in ac-

tivities related to his employment at the time of the fire and requested leave to amend its answer to restore the two state law defenses that had been ordered stricken by the trial court. The trial court denied respondent's motion (R. 681, 689).

In instructing the jury, the trial court did not charge the jurors that petitioner could recover under the FELA only if he was engaged in activities related to his employment at the time he sustained his injuries. The court's instructions throughout assumed that the FELA was applicable to petitioner's claim (R. 168, 174-75, 176, 180-81, 185, 190, 191-93).

In instructing on how the jury should assess the preponderance of the evidence, the trial court omitted to instruct that the jury could consider the intelligence of the witnesses and the number of witnesses who testified on a material issue, as Section 38-107 of the Georgia Code explicitly provides (R. 170-71).[2]

The jury returned a verdict for petitioner. The trial court denied respondent's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (R. 675-76). On appeal by respondent, the Court of Appeals of Georgia ruled that the trial court

---

[2] Ga. Code Ann. § 38-107:

> "*Determination of where preponderance of evidence lies.*— In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may appear from the trial. The jury may also consider the number of witnesses, though the preponderance is not necessarily with the greater number."

had erred in failing to submit to the jury the question whether petitioner was "engaged in activities incident to or an integral part of his employment" when he was injured. In addition the appellate court ruled that the trial judge had erred in failing to instruct the jury, in accordance with the requirements of the Georgia statute, that it could consider the intelligence and number of witnesses in determining the preponderance of the evidence (R. 679).

On January 17, 1966, the Supreme Court of Georgia denied petitioner's application for a writ of certiorari to review the action of the Court of Appeals (R. 721).

REASONS FOR DENYING THE WRIT

1. There Is No Final Judgment Subject to Review in This Court.

Under 28 U.S.C. § 1257 this Court's jurisdiction to review decisions of state courts extends only to final judgments. The judgment of the Georgia Court of Appeals is not a final judgment within the meaning of that section, and the petition must therefore be denied.

The Court of Appeals reversed the judgment of the Superior Court of Cobb County in favor of petitioner and ordered a new trial.[3] This Court has consistently recognized that a state court judgment of reversal

[3] The judgment, entered September 23, 1965, states that the judgment of the Superior Court is

> "reversed as to the order of court sustaining the plaintiff's demurrers to paragraph 22 of the defendant's original answer and in refusing to allow the defendant to amend its answer to reinstate the defenses originally contained in paragraph 22 of the answer, such errors requiring a new trial."

And in its opinion, the Court of Appeals makes clear that the case "must be tried again" (R. 697).

for a new trial lacks the finality required by 28 U.S.C. § 1257. *Southern Pac. Co.* v. *Gileo,* 351 U.S. 493, 495-96 (1956) (dismissing petitions as to two respondents in FELA cases); *Urie* v. *Thompson,* 337 U.S. 163, 171-72 (1949); *Gospel Army* v. *Los Angeles,* 331 U.S. 543 (1947); *Cincinnati Street Ry.* v. *Snell,* 179 U.S. 395 (1900); *Johnson* v. *Keith,* 117 U.S. 199 (1886); *Tracy* v. *Holcombe,* 65 U.S. (24 How.) 426 (1860). As Mr. Justice Rutledge, writing for a unanimous Court in *Gospel Army* v. *Los Angeles, supra,* stated, "where the effect of the state court's direction is to grant a new trial, the judgment will not be final." (331 U.S. at 546.)[4]

For a state court judgment to be reviewable under Section 1257, a provision designed to avoid premature and piecemeal review, "it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.'" *Gospel Army* v. *Los Angeles, supra,* at 546, quoting from *Department of Banking* v. *Pink,* 317 U.S. 264, 267 (1942). The judgment of the Georgia Court of Appeals in no way meets this requirement. It does not, fully or partially, determine the issues between petitioner and respondent. It does not direct the trial court to enter any judgment, but rather requires it to hold a second trial—hardly a "ministerial" act. In short, the judgment does not constitute "an effective determination of the litiga-

---

[4] See Stern & Gressman, Supreme Court Practice 77 (3d ed. 1962):

> "The most obvious non-final judgment of this character is one which orders a new trial following final disposition of the legal issues at stake."

tion" but merely concludes an "interlocutory or intermediate" stage. *Market Street Ry.* v. *Railroad Comm'n,* 324 U.S. 548, 551 (1945). See *Department of Banking* v. *Pink, supra.*

None of the special characteristics that on occasion have caused this Court to treat as final a judgment that on its face seemed interlocutory is present in this case. The judgment of the Georgia Court of Appeals does not purport to require petitioner to take any affirmative action. Compare *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120 (1945). It does not constitute an erroneous assertion of jurisdiction in an area in which the state courts lack power to proceed at all. Compare *Local 438, Construction & General Laborers' Union* v. *Curry,* 371 U.S. 542 (1963). There is no stipulation of facts or concession by either party that would make a second trial a formality, nor has the Georgia Court of Appeals passed upon all the issues that control the litigation. Compare *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 73-74 (1946). Failure to review now still leaves petitioner free to prove his claim in the new trial. See *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68 (1948).

2. This Case Presents No Substantial Federal Question for Review by This Court.

Throughout its instructions, the trial court emphasized that the case was being tried under the FELA. The trial court, however, did not instruct the jury that, in order to recover under that Act, petitioner must have been engaged in activities related to his employment when he sustained his injuries. The result, as the Court of Appeals of Georgia recognized, was to withhold from the jury the basic question whether

petitioner was injured while engaged in activities related to his employment.

The only issue presented by the petition is the correctness of the Court of Appeals' ruling that the trial court erred in failing to submit this question to the jury. This is neither an important nor a novel question of federal law. Its answer depends largely upon the particular facts of this case.

The ruling below is in keeping with the pronouncements of this Court in many cases arising under the FELA. See, *e.g., Rogers* v. *Missouri Pac. R.R.,* 352 U.S. 500, 508-10 (1957); *Bailey* v. *Central Vermont Ry.,* 319 U.S. 350, 354 (1943); *Tiller* v. *Atlantic Coast Line R.R.,* 319 U.S. 54, 67-68 (1943). As these decisions reflect, Congress made trial by jury an integral part of the cause of action provided by the Act. It did not intend that only employees should be entitled to have disputed issues of fact submitted to the jury. As this Court emphasized in *Tennant* v. *Peoria & P. U. Ry.,* 321 U.S. 29, 35 (1944),

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . . That conclusion, *whether it relates to negligence, causation or any other factual matter,* cannot be ignored. . . ." (Emphasis added.)

The decision below is clearly in accord with decisional authority and consistent with the recognized ob-

jectives of the FELA. The Act, in 45 U.S.C. § 51, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person *suffering injury while he is employed* by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis added.)

This language has invariably been construed as limited to injuries sustained by an employee while performing work for his employer or engaged in some activity related to his work. See, *e.g., Sassaman* v. *Pennsylvania R.R.,* 144 F.2d 950 (3d Cir. 1944); *Metropolitan Coal Co.* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959); *Baum* v. *Baltimore & O. R.R.,* 256 F.2d 753 (7th Cir.), *cert. denied,* 358 U.S. 881 (1958).

Both the federal and the state courts have held that the question whether the plaintiff in an action under the FELA was engaged within the scope of his employment when he was injured is a question of fact for the jury, certainly when the evidence relating to the question is in conflict. *Powers* v. *New York Cent. R.R.,* 251 F.2d 813, 816 (2d Cir. 1958): "Whether Powers was acting within the scope of his employment at the time of the accident which led to his submersion in the Hudson River was a question to be resolved by the jury from all the surrounding circumstances." See, *e.g., Texas & Pac. Ry.* v. *Jones,* 298 F.2d 188 (5th Cir. 1962); *Halderman* v. *Pennsylvania R.R.,* 53 F.2d 365 (2d Cir. 1931); *Worthen* v. *Thompson,* 343 Ill. App.

62, 98 N.E.2d 142 (Ill. App. Ct. 1951); *Louisville & N. R.R.* v. *Pettis,* 206 Ala 96, 89 So. 201 (1921); *Sullivan* v. *Matt,* 130 Cal. App. 2d 134, 278 P.2d 499 (Dist. Ct.App. 1955).[5]

The evidence relating to petitioner's status at the time he was injured is in conflict on several points. Petitioner testified that it was customary for engineers to use the caboose. One witness testified that respondent had a rule against their using it, and other witnesses said that, although the caboose was for the use of trainmen, enginemen frequently or occasionally made use of it. There was dispute, as well, whether petitioner was subject to call between the time he quit work on the day of the fire and the time he was scheduled to report for duty on the following morning and whether it was for respondent's benefit that he spent the night in Westminster. Under controlling decisions, these questions should have been submitted to the jury. This is the substance of the Georgia Court's ruling: "[U]nder the conflicting evidence in this case, the determination of this issue was one of fact for the jury . . . ." (R. 695.) Even if its judgment were final, and thus within this Court's jurisdiction, it presents no federal question meriting review.

---

[5] This Court has adopted a similar position in a closely related context. Prior to the amendment of the FELA in 1939, which abolished the "moment of injury" rule, the Court ruled that whether an employee was engaged in interstate commerce at the time he was injured was a question for the jury. *Southern Ry.* v. *Lloyd,* 239 U.S. 496 (1916); *Pennsylvania Co.* v. *Donat,* 239 U.S. 50 (1915).

3. There Is an Independent and Adequate Non-Federal Ground for the Decision Below.

In instructing the jury on how it should assess the preponderance of the evidence, the trial court followed closely the language of Section 38-107, Ga. Code Ann., but failed to mention two of the criteria prescribed in that section—the intelligence of the witnesses and the number of witnesses. The Court of Appeals of Georgia held that the omission of these statutory criteria was error.[6] This ruling applying Georgia law is independent of the federal question in the case and adequate to sustain its reversal of the judgment for petitioner. See *Herb* v. *Pitcairn,* 324 U.S. 117 (1945).

In actions arising under the FELA, the state courts are free to adhere to their own local rules of procedure, so long as those rules do not "impose unnecessary burdens" upon the rights conferred by the Act. *Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, 298 (1949), and dissenting opinion; *Douglas* v. *New York, N.H. & H. R.R.,* 279 U.S. 377, 388 (1929); *Minneapolis & St.L. R.R.* v. *Bombolis,* 241 U.S. 211 (1916). See generally Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?,* 17 Ohio St. L.J. 384 (1956).

---

[6] As petitioner states, the record does not disclose whether counsel for respondent objected to the trial court's omission at the time it was made (Petition for Certiorari, p. 30), but petitioner concedes that Georgia law did not require such objection to be made at the conclusion of the trial court's instructions. *Ibid.* Moreover, petitioner's citation of authorities to establish the incorrectness, under Georgia law, of the Court of Appeals' ruling is not in point. Whether respondent's objection was timely and whether the trial court's instructions were fatally incomplete are questions of state law not customarily subject to review in this Court.

The insistence of the Georgia court on strict conformity to the state statutory provision cannot be said to impede or unnecessarily burden the assertion of federal rights. The provision does not have the effect of closing the doors of the state courts to suits under the Federal Employers Liability Act, nor does it threaten the unwary or unschooled litigant with forfeiture of his federal claim. Compare *Brown* v. *Western Ry. of Alabama, supra.* The ruling of the court below on the state statutory provision therefore, is an adequate, independent basis for its judgment reversing for a new trial.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STANLEY L. TEMKO
701 Union Trust Building
Washington, D. C. 20005

CHARLES J. BLOCH
710 Walnut Street Building
Macon, Georgia

JOHN W. MADDOX
P. O. Box 29
Rome, Georgia

Attorneys for Respondent

COVINGTON & BURLING
Of Counsel